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October 1, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Dortch:

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this letter in response to the September 20, 2004 *ex parte* filed by Time Warner, Inc. ("Time Warner"), urging the Commission "to hold that the plain language of Section 251(b)(5) applies to ISP-bound traffic ...." In joint filings with Verizon, BellSouth has outlined the legal problems inherent with any attempt to subject ISP-bound traffic to Section 251(b)(5), and BellSouth will not repeat those problems here. However, Time Warner's *ex parte* contains several inaccurate statements to which BellSouth must respond.

Time Warner's insistence that the Commission no longer needs to be concerned about arbitrage "since dial-up internet access is decreasing not increasing" is without merit. While the number of dial-up subscribers has declined with the growth in broadband, the level of dial-up minutes of use has not. According to one industry study, residential customers using dial-up generated 1.92 billion minutes of use nationwide in 2003; in 2004 dial-up minutes of use by residential customers are expected to exceed 1.97 billion nationwide. From 2003 to 2006, it is projected that the total residential minutes of use associated with dial-up Internet traffic in the United States will increase by 68 million minutes, although the pace of growth is expected to slow. A summary of the dial-up usage and subscribership data from this study is enclosed.

Equally without merit is Time Warner's claim that a decision by the Commission to establish compensation rates for ISP-bound traffic under Section 201 would likely "create continued uncertainty and disputes." In the *ISP Remand Order* issued in 2001, the Commission adopted a comprehensive system for the treatment of ISP-bound traffic, which included setting a $0.0007 compensation rate for ISP-bound traffic and putting in place reasonable restrictions on when such compensation would be paid. The *ISP Remand Order* provided certainty for the industry and eliminated the vast majority of disputes over ISP-bound traffic that have plagued the industry since 1996. A decision by the Commission to articulate clearly that Section 201 provides the jurisdictional underpinnings of the Commission's treatment of ISP-bound traffic would have no negative implications for the industry.

By contrast, any decision by the Commission to eliminate the caps and new market restrictions adopted in the *ISP Remand Order* would disrupt significantly the telecommunications industry by upending the system under which carriers have been operating for approximately three years. It also would likely lead to increased litigation and yet more regulatory uncertainty at a time when the industry can least afford it. Removal of the caps and new market restrictions also would result in the very "opportunities for regulatory arbitrage" and economic distortions "related to competitive entry into a local exchange and exchange access markets" that the caps and new market restrictions were intended to eliminate in the first place. *ISP Remand Order* ¶ 2. The caps on ISP bound traffic affect all carriers equally by putting the responsibility for recovering costs associated with greatly unbalanced traffic on the ISP and the carrier serving it. This, of course, is consistent with the Commission's stated goal in the inter-carrier compensation proceedings of encouraging carriers to recover costs from their own end users. Traffic data from BellSouth's region show that alternative carriers continue to do very substantial business with ISPs (and have unbalanced traffic far in excess of the caps as a result). Thus, the caps have worked to accomplish the Commission's policy objective of end-user recovery while continuing to allow alternative carriers to compete successfully for ISP business. The compelling legal and policy justifications for the caps and new market restrictions set out previously by the Commission remain, and there is no justification for changing this result.

There also is no justification for creating artificial incentives for carriers to serve IPSs predominantly or exclusively, which would be the case if ISP-bound traffic were subject to state reciprocal compensation rates under Section 251(b)(5), as Time Warner has proposed. The average state-commission approved reciprocal compensation rate paid by BellSouth in its region for end office and tandem switching is as high as $0.00293 per minute of use, which is more than four times the Commission-mandated $0.0007 rate for ISP-bound traffic. The average reciprocal compensation rate for end office and tandem switching in BellSouth's region is $0.019074 per minute of use, which is almost three times the Commission-approved rate for ISP-bound traffic. The opportunity to collect greater amounts of reciprocal compensation if ISP-bound traffic were subject to Section 251(b)(5) would undoubtedly create the same economic distortions and regulatory arbitrage that the *ISP Remand Order* was intended to stop.

Sincerely,

Herschel L. Abbott, Jr.

HLA,Jr:kjw
Encl.

cc: Bryan Tramont
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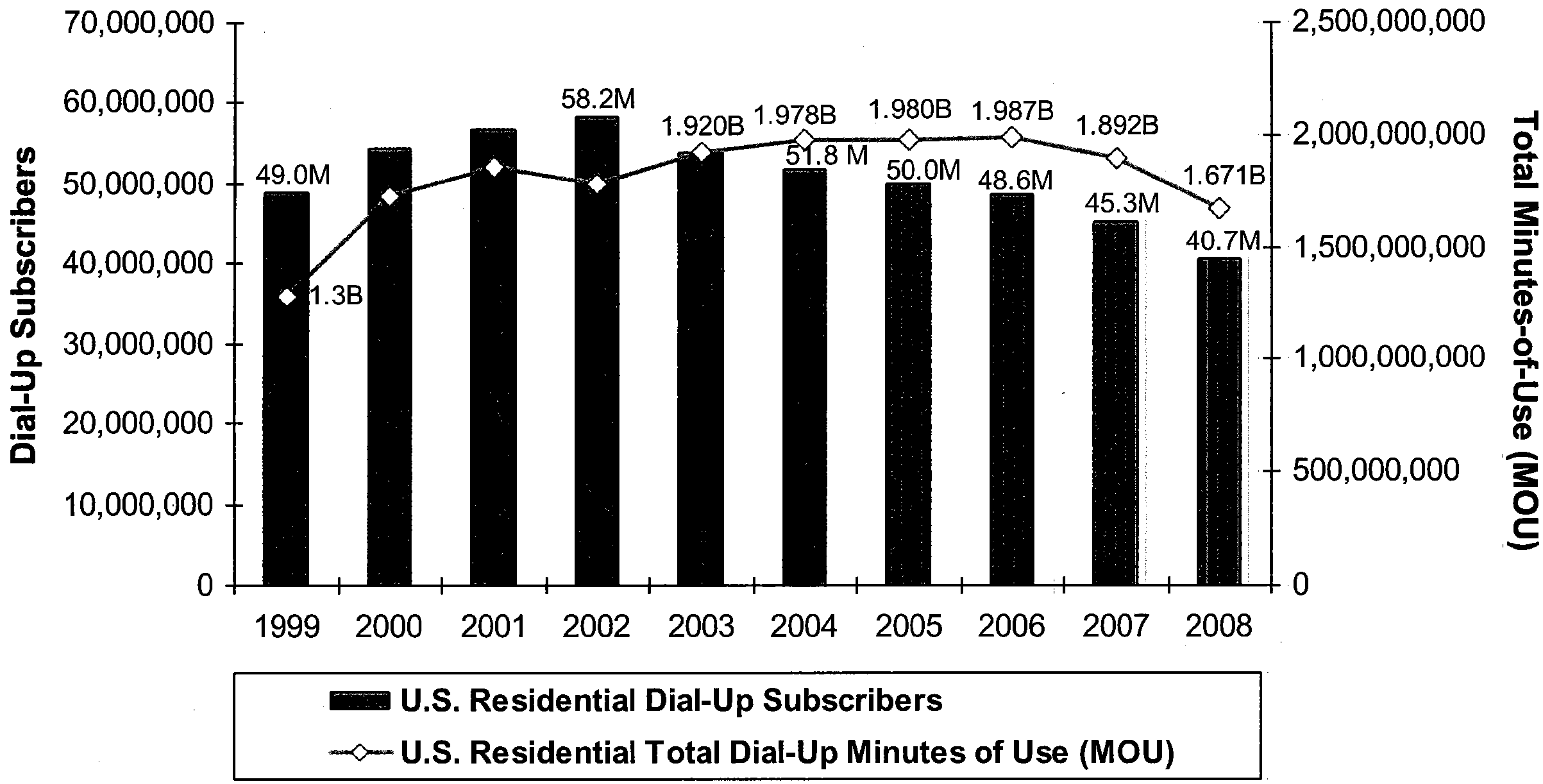
Dial-Up Minutes of Use (MOU)



- The U.S. residential dial-up market peaked in 2002, and the total subscriber base has gradually declined each year since. In the next five years, In-Stat/MDR predicts a loss of 10 million subscribers, to roughly 40 million subscribers in 2008.
  (In-Stat/MDR has adjusted for both new adds as well as subscriber churn in its forecast.)
- Despite a shrinking base, existing dial-up customers are increasing their total minutes of use. From 2003-2006, the total minutes of use of dial-up in the U.S. by consumers will increase by 68 million minutes, although slowing in pace, while dial-up subscribers will drop by over 5 million subscribers.

Source: In-Stat/MDR, Analyst Daryl Schoolar (September 2004)